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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HUGO SANCHEZ, Defendant and Appellant.	B292014 (Los Angeles County Super. Ct. No. NA106967-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed and remanded.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Hugo Sanchez guilty of first degree residential burglary. (Pen. Code, § 459 [count 2].)[1] The jury was unable to reach a verdict as to a charge of second degree vehicle burglary (§ 459 [count 1]), and the trial court dismissed that count in the interests of justice.

Sanchez admitted that he suffered three prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and had served four prior prison terms (§ 667.5, subd. (b)).

The trial court struck two of Sanchez's three prior strikes and sentenced him to a total of 18 years in prison, consisting of the middle term of 4 years in count 2, doubled pursuant to the three strikes law, plus two 5-year prior prison term enhancements under section 667, subdivision (a)(1).[2]

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Two of the three prior serious felony convictions were brought and tried together. Section 667, subdivision (a)(1)

On appeal, Sanchez contends that (1) the trial court abused its discretion by admitting evidence of a prior burglary for purposes of demonstrating intent, (2) the case must be remanded to the trial court to allow it to exercise its discretion to strike his two 5-year prior serious felony conviction enhancements pursuant to Senate Bill No. 1393, and (3) the trial court failed to recognize its discretion when it imposed a $5,400 restitution fine.

We agree with Sanchez that the case must be remanded to the trial court to consider exercising its discretion under Senate Bill No. 1393, and to expressly exercise its discretion in setting the restitution fine under section 1202.4, subdivision (b). In all other respects, the judgment is affirmed.

FACTS

Prosecution

Prior Burglary

At trial, the prosecution presented evidence of Sanchez's prior burglary offense, through the testimony of the two victims of that crime and the investigating police officer, for the purpose of establishing intent to commit the charged crimes. On the evening of July 12, 2012, Eric

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provides for a "five-year enhancement for each such prior conviction on charges brought and tried separately."

Dumas parked his car in his apartment building's secured underground parking structure, and locked it before going to his apartment.

The next morning, Dumas and his wife, Tamara Manavi, noticed that the car's trunk was open and the driver's side door was unlocked. Dumas noticed that items were "rummaged about" inside the car. A gym bag, sunglasses, makeup, and clothes that Manavi left in the car were missing. The glove compartment was wide open, and credit cards Manavi had left inside it were also missing.

Dumas and Manavi had not given anyone permission to go inside the car. Dumas immediately reported the incident to the police. Sanchez was taken into custody and, in an interview with the investigating officer, confessed to taking items from inside of the car, including Manavi's credit cards.

The Charged Burglary

On July 21, 2017, Floritulia Peralta was living in an apartment complex in Long Beach that had a two-level underground secured parking garage. Peralta owned a maroon 1993 Ford Aerostar, which she parked in an assigned space on the lower level of the garage.

Peralta's son, Richard de la Sancha, lived with her. She would sometimes lend him the van, but she did not give him a set of keys. Peralta did not give anyone else permission to enter her van.

The apartment building was under video surveillance by a security firm. On July 21, 2017, Marianne Tiang was monitoring the garage security cameras from a remote facility. She knew the garage had prior issues with theft from the bike rack, vandalism, and loitering.

At 3:30 a.m., Tiang saw Sanchez approach a gray SUV and appear to check the door. He then walked over to the bike rack area. He loitered near the bike rack, and did not approach any specific bike. Sanchez's actions caught Tiang's attention because, in her experience, when someone owned a vehicle or bicycle, they generally walked directly to it.

Tiang used a public address system connected to the security cameras to "voice [Sanchez] down." She warned Sanchez that he was being watched and was considered to be trespassing. She directed Sanchez to leave the property. Sanchez walked down the stairs to the bike rack on the garage's lower level. He looked at multiple bicycles, which Tiang considered unusual. She advised Sanchez that his picture had been taken and that the police were being notified of his presence. Sanchez acknowledged the "voice down" by looking at the camera. Tiang immediately called the police.

Sanchez then approached Peralta's van. Tiang observed Sanchez inside the van with the front passenger door open.

While Tiang monitored Sanchez, her supervisor reviewed the security tapes. Tiang's supervisor showed her

a video of Sanchez scaling a six-foot-high fence at the front of the complex to access the garage.

The police arrived approximately ten to fifteen minutes after Tiang reported Sanchez. Sanchez had not left the van and was still sitting in it when the police arrested him. Long Beach Police Officer Christopher Castillo and two other officers ordered him to exit the vehicle, and placed him under arrest.

Sanchez told Officer Castillo that the van belonged to his aunt, Floritulia Peralta, and that he had permission to sit in it. He gave the officers Peralta's apartment number.

The officers determined that Peralta was the registered owner of the van. They woke her and brought her to the parking garage. Nothing was missing from the van, and it had not sustained any damage.

Peralta identified Sanchez at the time of the crime and again in court. She told the officers she did not know him and had never seen him at the building, but she said she had seen him once at the laundromat.

Defense

Peralta's son, de la Sancha, had been friends with Sanchez for at least 15 years, beginning in high school. Sanchez has been to Peralta's apartment about ten times. Sanchez and de la Sancha would hang out in Peralta's van and drive around in it. Sanchez sometimes waited in the van while de la Sancha went into the apartment.

The apartment building had installed security cameras three or four years before the incident. One of the security cameras took a picture of Sanchez and de la Sancha together. After learning about the picture, de la Sancha told Sanchez that he could not hang out in the complex or the parking lot alone, because Peralta might be evicted.

De la Sancha testified that the driver's side door of Peralta's van could be unlocked using a finger. All of the other doors could then be unlocked with the push of a button. De la Sancha had been to the laundromat Peralta used with Sanchez, and had driven Sanchez there in her van.

Sanchez's sister, Brenda Sanchez Jimenez, testified that de la Sancha is Sanchez's best friend. Sanchez's mother, Selena Jimenez Santana, testified that she knew Peralta, and that Sanchez had known de la Sancha for a long time.

Sanchez did not testify on his own behalf.

DISCUSSION

Evidence of Prior Burglary

Sanchez argues that the trial court abused its discretion and violated his constitutional right to due process by admitting evidence of his prior burglary conviction, which was not sufficiently similar to the charged crime, and highly prejudicial. We reject the contention.

Legal Principles

"Section 459 provides in pertinent part that '[e]very person who enters any house, room, apartment, tenement . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.' . . . [Citation.]" (*People v. Thorn* (2009) 176 Cal.App.4th 255, 261.) "A conviction for first degree burglary . . . requires 'entry' of an 'inhabited dwelling house' with the intent to commit a felony. (§§ 459, 460.)" (*Ibid.*) Entering a parking structure that is "contiguous to and functionally interconnected with" an inhabited apartment building with the intent to steal is first degree burglary. (*Id.* at p. 263.)

Evidence Code section 1101, subdivision (b), permits the introduction of evidence that "a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." The connection of the evidence of prior crimes with the crime charged must be clearly perceived, and it has sufficient probative value only when it "'"tend[s] logically, naturally, and by reasonable inference, to establish any fact material for the [P]eople, or to overcome any material matter sought to be proved by the defense."' [Citation.]" (*People v. Haston* (1968) 69 Cal.2d 233, 247.) "'[A]dmissibility [of other crimes evidence] depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2)

the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence.' [Citation.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on other grounds as recognized in *People v. Jennings* (1991) 53 Cal.3d 334, 386–387 & fn. 13.)

"'Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." [Citation.]' . . . [Citation.]" (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754 (*Ghebretensae*).) "'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)" (*People v. Harris* (2013) 57 Cal.4th 804, 841.) "'We have long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" [citations], and

that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution. [Citations.]' [Citations.]" (*Ghebretensae*, *supra*, at p. 754.)

The court may nonetheless exclude such evidence under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence Code section 352 is intended to prevent undue prejudice—that is, "'"evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,"' not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925 (*Padilla*), overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) The trial court's decision "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest

miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Proceedings

Prior to trial, the court heard argument regarding whether the prosecution would be permitted to admit evidence at trial, under Evidence Code section 1101, subdivision (b), of Sanchez's prior burglaries—one that occurred in 2012, and two that occurred in a single incident in 2013. The prosecutor reasoned that the incidents were similar and therefore probative of intent, which was the central issue in the case.

Defense counsel objected on the basis that the evidence was highly prejudicial and not relevant. She argued that in the prior cases Sanchez did not know the burglary victims; in the present case his friend's mother was the alleged victim. The prior burglary evidence was improper propensity evidence that should not be submitted to the jury.

The trial court asked if there was a subterranean parking lot involved in the earlier incidents. Defense counsel confirmed that there was. The trial court ruled that the incidents were relevant to intent and admissible for that purpose. The trial court further noted that the prior crimes were relatively recent, and found that their probative value outweighed any prejudicial effect the evidence might have.

Defense counsel requested that the court limit the number of witnesses who could testify regarding the 2012

burglary, "because at that point it would become highly prejudicial." The court stated that it would not preclude live witnesses, but that it also would not allow the prosecutor "to go on and on and on."

At trial, the prosecutor presented evidence of the July 12, 2012 burglary only, through the testimony of the two victims and the police officer.

Analysis

Sanchez contends that the trial court abused its discretion in admitting the prior burglary evidence under Evidence Code section 1101, subdivision (b), because the present and prior crimes differ factually in significant ways. He argues that in the prior burglary, Sanchez broke into a locked car belonging to strangers and stole two credit cards, a gym bag, sunglasses, makeup and clothes, whereas in the charged burglary, he scaled a fence and entered a parking garage, where he sat in his best friend's mother's van and did not steal anything. He asserts that even if the crimes are sufficiently similar under Evidence Code section 1101, subdivision (b), the evidence should have been excluded under Evidence Code section 352, because it was highly prejudicial and of limited probative value, and the volume of testimony offered in support of the prior burglary unfairly bolstered a relatively weak case.

The People assert that Sanchez forfeited the argument that the evidence was inadmissible under Evidence Code

section 1101, subdivision (b), because it failed to raise the issue in the trial court. We recognize that the issue was argued in a relatively cursory manner, and defense counsel did not reference specific code sections, but we conclude her argument that the cases were factually dissimilar was sufficient to preserve Sanchez's challenge to the evidence under Evidence Code section 1101, subdivision (b), for appeal.

The argument fails, however. For purposes of demonstrating intent, the two offenses need only be sufficiently similar to show that Sanchez probably harbored the same intent—the fact that he entered a secured, subterranean parking structure at night and a vehicle without consent in both instances is sufficient to meet that standard.

With respect to Sanchez's argument that the evidence was more prejudicial than probative under Evidence Code section 352, we cannot conclude that the trial court abused its discretion by admitting evidence of the prior burglary. There was no question that Sanchez was in Peralta's van inside a secured subterranean parking lot without permission to be in either the parking lot or the van. Intent was the only element at issue at trial, and the fact that Sanchez had engaged in identical behavior in the relatively recent past and had taken items on that occasion was strongly probative of his intent in the charged burglary. The prejudice involved was the permissible prejudice "'that naturally flows from relevant, highly probative evidence.'

[Citations.]" (*Padilla*, *supra*, 11 Cal.4th at p. 925.) Moreover, the evidence presented was not prejudicial due to its sheer volume, as Sanchez argues. The testimony spanned only 36 pages of transcript. Given that the prosecutor needed to elicit the circumstances underlying the crime and establish that it occurred, the amount of time devoted to presenting evidence of the prior crime was reasonable. That the evidence did not, in fact, evoke emotional bias is demonstrated by the jury's inability to reach a verdict on the vehicle burglary charges.

Senate Bill No. 1393

Senate Bill No. 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) §§ 1, 2.) The new law took effect on January 1, 2019, and therefore applies to Sanchez, whose appeal is not yet final. While the People agree that the new legislation is applicable, they argue that remand would be futile in this case, because the trial court could have stricken all of Sanchez's prior strike convictions and imposed a shorter sentence, but did not. We disagree.

In a bifurcated bench trial, Sanchez admitted that he suffered three prior strike convictions for burglary (§ 459), but requested that the trial court strike the prior convictions

in the interests of justice pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

The *Romero* motion was heard at the sentencing hearing. Defense counsel requested that the trial court strike all three of Sanchez's burglary strikes and impose the low term of 2 years, plus the two mandatory 5-year enhancements under section 667, subdivision (a)(1), for a total of 12 years in prison.

The prosecutor argued that the trial court should decline to strike Sanchez's three strikes and impose a sentence of 26 years to life. Alternatively, if the trial court struck all but one of the prior convictions, the prosecutor requested imposition of the high term of 6 years for the burglary, doubled pursuant to the three strikes law, plus the two mandatory 5-year section 667, subdivision (a)(1) enhancements, for a total of 22 years in prison. The prosecutor argued that the prior crimes were "extraordinarily similar" to the instant crime—all having taken place in subterranean parking garages—and that there was evidence in one case that Sanchez was detained because someone observed him stealing a bike from a back yard. He noted that Sanchez had been seen "scouting out the bicycle area of the parking garage" in the other prior case. Additionally, Sanchez had committed the instant crime within six months of being paroled.

The court imposed sentence. With respect to the strikes, it stated, "Well, I think certainly the court has the option of sentencing him as a third striker. I don't think,

based upon his record, based on the facts and circumstances of this case, that this is a third strike case. [¶] And I think it would really be -- it wouldn't be appropriate nor fair to the defendant to sentence him as a third striker, not based upon the facts of this case nor the prior cases. [¶] So based upon that fact, I am going to strike [two of the prior strike convictions]. So this becomes a one strike case. [¶] Notwithstanding that, Mr. Sanchez, you have a penchant for engaging in this kind of behavior. And I agree with [the prosecutor] in the sense that you're barely out and you're doing the very same thing, notwithstanding you're friends with this individual. And that kind of behavior is inappropriate, absolutely inappropriate."

The trial court imposed the middle term of four years for the burglary, doubled pursuant to the three strikes law, plus the two mandatory 5-year section 667, subdivision (a)(1) enhancements, for a total of 18 years in prison.

The court's explanation of its reasoning demonstrates a thoughtful balancing of the concerns underpinning the three strikes law against the unfairness of imposing a lengthy sentence in light of the particular circumstances of this case and the prior cases. While the facts presented are sufficient to support Sanchez's residential burglary conviction, which is unquestionably a strike offense, on the spectrum of strike offenses it is a mild crime. Sanchez climbed over a wall, looked at some bicycles, and then opened and sat in his friend's mother's car. This appears to be exactly the type of offense contemplated by the Legislature when it later

determined to give trial courts greater discretion to bestow leniency by striking five-year enhancements. Given that the Legislature felt this change in the law was needed, it does not seem unlikely to us that the trial court—which clearly took into account the state's valuation of both the crime and Sanchez's recidivism when pronouncing sentence—may deem a lesser punishment more appropriate. Accordingly, we remand this matter for the trial court to consider whether to exercise its discretion to strike the two section 667, subdivision (a)(1) enhancements.

Restitution Fine

Finally, Sanchez argues that the trial court's imposition of a $5,400 restitution fine under section 1202.4, subdivision (b), was an abuse of discretion because the record indicates that the trial court believed imposition of that specific amount was mandatory. We agree that the trial court's language indicates a misunderstanding of its discretion and we remand for the court to exercise its discretion in imposing an appropriate fine.[3]

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[3] With respect to both the People's argument that the contention was forfeited by a failure to object and Sanchez's argument that counsel provided ineffective assistance, we exercise our discretion to consider the issue on the merits, mooting both arguments. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 404 (*Urbano*).)

Section 1202.4, subdivision (b), provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). . . . [¶] (2) In setting a felony restitution fine, the court *may* determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b), italics added.) "Within the range authorized by statute, the court has wide discretion in determining the amount [of a restitution fine]." (*Urbano*, *supra*, 128 Cal.App.4th at p. 406; cf. § 1202.4, subd. (b)(1).)

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. (See *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741.) A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentenc[ing decision] is or may have been based on misinformation regarding a material aspect of a defendant's

record. (See *People v. Ruiz* (1975) 14 Cal.3d 163, 168.)" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

In this case, the court imposed a $5,400 fine, stating, "[y]ou are to pay a mandatory $300 restitution fine per year." While this amount falls within the statutory minimum of $300 and the maximum of $10,000, and was likely within the trial court's discretion, it is not clear that the trial court exercised its discretion in setting it. Although we are mindful of the presumption that a trial court is aware of and follows the law (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178–1179), the phrase used by the trial court in this case—"mandatory $300 restitution fine per year"—was inaccurate on its face because it suggested that the sentencing calculation provided for in section 1202.4, subdivision (b)(2) (the minimum fine times the number of charges times the number of years imposed) was mandatory, rather than optional.[4] We therefore reverse the restitution fine and remand for the trial court to expressly exercise its discretion.

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[4] This particular language has also been the subject of several appeals, requiring the use of judicial resources that are better utilized elsewhere. (See, e.g., *People v. Turner* (Dec. 1, 2016, B268088); *People v. McGary* (Dec. 20, 2013, A132566); *People v. House* (June 27, 2013, B212057); *People v. Bradford* (Nov. 5, 2008, B206140); *People v. Delgado* (Mar. 3, 2006, B181955); *People v. Diaz Ramirez* (Mar. 9, 2005, H027198) [nonpub. opns.].)

DISPOSITION

We remand the cause to the trial court to consider exercising its discretion under Senate Bill No. 1393, and to expressly exercise its discretion in setting the restitution fine under section 1202.4, subdivision (b). In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.